

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

BRIAN M. WACIK
(CRD No. 1667489),

Respondent.

Disciplinary Proceeding
No. 2006006537201

Hearing Officer—Andrew H. Perkins

DEFAULT DECISION

October 10, 2008

The Respondent is barred in all capacities for borrowing from a customer and concealing the loan from his member firm in violation of Conduct Rules 2370 and 2110. In light of the bar, no further sanction is imposed for Respondent's failure to amend his Form U4 in violation of Conduct Rule 2110 and IM-1000-1. In addition, Respondent is ordered to provide full restitution to the injured customer.

Appearances

David F. Newman, Senior Regional Counsel, FINRA, Philadelphia, PA, for the Department of Enforcement.

No appearance by or for Respondent.

DECISION

The Department of Enforcement ("Enforcement") filed the Complaint in this proceeding on May 12, 2008, asserting two causes of action against Respondent Brian M. Wacik ("Respondent"). The first cause of action alleges that Respondent willfully failed to report on his Uniform Application for Securities Industry Registration or Transfer (Form U4) that he had entered into a compromise and settlement of a creditor's claim and had a federal tax lien, in

violation of NASD Conduct Rules 2110 and IM-1000-1.¹ The second cause of action alleges that Respondent borrowed funds from a customer, failed to repay the customer in full, and falsely represented to his firm that he had not borrowed from any customers, in violation of NASD Conduct Rules 2370 and 2110.

Enforcement properly served Respondent with the Complaint, Notice of Complaint, and Second Notice of Complaint, but Respondent did not file an answer to the Complaint. On July 31, 2008, Enforcement filed a Motion for Entry of Default Decision and Request for Sanctions, to which Respondent did not respond. Accordingly, pursuant to NASD Procedural Rules 9215(f) and 9269, the allegations in the Complaint are deemed admitted and Enforcement's motion is granted.²

I. Respondent's Default

Enforcement served the Complaint and Notice of Complaint on Respondent at his most current residential address listed in the Central Registration Depository ("CRD Address") by first-class certified mail on May 8, 2008. The certified mailing to Respondent's CRD Address was returned to FINRA's District Office by the U.S. Postal Service marked "Unclaimed."

Enforcement served the Complaint and Second Notice of Complaint on Respondent by first-class certified mail at his CRD Address on June 12, 2008. On June 17, 2008, the FINRA District Office received the certified mailing return receipt signed by "Louise Wacik." Respondent again failed to respond to the Complaint.

¹ The FINRA Rules, which include NASD Procedural and Conduct Rules, are at www.finra.org/Rules.

² The factual determinations in this decision are based on the allegations of the attached Complaint and the materials filed by Enforcement with its motion.

Enforcement served the Complaint and the Notices of Complaint on Respondent in accordance with Procedural Rule 9134, which constitutes valid constructive notice of this proceeding. By failing to respond, he defaulted.

II. Jurisdiction

Respondent first became registered with FINRA on May 27, 1987. From October 17, 2001, until May 15, 2006, he was registered as an Investment Company and Variable Contracts Products Representative through member firm Brecek & Young Advisors, Inc. ("Brecek & Young"). Respondent has not been registered or associated with a member firm since his registration through Brecek & Young terminated.

The Complaint alleges violations that occurred while Respondent was associated with a member firm, and Enforcement filed the Complaint within two years after his registration with FINRA terminated. Accordingly, Respondent is subject to FINRA's jurisdiction.³

III. Origin of the Investigation

Enforcement initiated the investigation of Respondent after FINRA District staff received a Uniform Termination Notice for Securities Registration (Form U5), which disclosed that Respondent had entered into an improper loan agreement with customer AS. During the ensuing investigation, District staff learned that Respondent had failed to amend his Form U4 to include two reportable events.

IV. Findings of Fact and Conclusions of Law

A. Failure to Amend Form U4

The Complaint alleges in the first cause of action that Respondent willfully failed to amend his Form U4 to reflect that he entered into a compromise and settlement of a creditor's

³ See Article V, Sec. 4(a), FINRA By-Laws, available at www.finra.org/Rules (then follow "NASD Manual" hyperlink to "Corporate Organization: Bylaws").

claim on December 1, 2002, and that the Internal Revenue Service filed a tax lien against him on November 15, 2005. Article V, Section 2(c) of the FINRA By-Laws requires registered individuals to keep current the information of their Form U4s.⁴ Between December 1, 2002, and April 12, 2006, Respondent failed to amend his answer to Question 14K on the Form U4, which asks whether the registered representative has made a compromise with creditors within the past 10 years. In addition, between November 15, 2005, and February 13, 2006, Respondent failed to amend his answer to Question 14M, which asks whether the applicant has any unsatisfied judgments or liens.

In a written statement to FINRA in November 2006 and at his on-the-record interview on September 13, 2007, Respondent admitted that he knew about the two reportable events and that he had made similar disclosures in the past. Nonetheless, Respondent admitted that he did not report these two events.⁵

The allegations in the First Cause of Complaint are sufficient to establish that Respondent willfully failed to update his Form U4, as required by the FINRA By-Laws. Accordingly, the Hearing Officer finds that Respondent violated NASD Conduct Rule 2110 and IM-1000-1.⁶ Conduct Rule 2110 and IM-1000-1⁷ require associated persons to disclose accurately and fully information required in the Form U4 and to observe the high standards of commercial honor and just and equitable principles of trade. The accuracy of an applicant's Form U4 "is critical to the

⁴ Under Article V, Section 2(c) of the FINRA By-Laws, associated persons are required to amend their Form U4 not later than 30 days after learning of the facts or circumstances giving rise to the amendment.

⁵ Decl. ¶ 11.

⁶ *Dep't of Enforcement v. Toth*, No. E9A2004001901, 2007 NASD Discip. LEXIS 25, at *23 (N.A.C. July 27, 2007).

⁷ IM-1000-1 provides that the filing of registration information that "is incomplete or inaccurate so as to be misleading ... or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade" in violation of Rule 2110. *See also Thomas R. Alton*, 52 S.E.C. 380, 382 (1995).

effectiveness” of a self-regulatory organization’s ability “to monitor and determine the fitness of securities professionals.”⁸

B. Borrowing from a Customer and Misrepresentation to Firm

The Complaint alleges in the second cause of action that Respondent twice borrowed money from his customer, AS, in 2005. On the first occasion in September 2005, Respondent told AS that he needed a loan because he was in financial trouble. At the time, AS was approximately 71 years of age and had multiple sclerosis. Her annual income was approximately \$25,000. Respondent obtained a \$5,000 loan, which he repaid within five weeks with \$20 in interest. Respondent did not document the loan.

In October 2005 Respondent solicited and obtained a \$40,000 loan from his customer, AS. Again, he did not document the loan. He also did not tell AS when he would repay the loan. To lend the money, AS had to make a partial withdrawal from her variable annuity, which caused her to incur a surrender charge of \$842.78. Respondent did not repay the \$40,000 loan.

Throughout the period in question, Brecek & Young prohibited its registered representatives from borrowing money from customers. On November 10, 2005, Respondent completed, signed, and submitted the 2005 “Annual Compliance Questionnaire.” In response to a question that asked if Respondent had borrowed money from a customer, Respondent answered “No.” This answer was false. He had borrowed \$45,000 from AS shortly before submitting the questionnaire.

Except in very limited circumstances that are not applicable here, Conduct Rule 2370 prohibits a person associated with a member firm from borrowing from a customer. The allegations in the Second Cause of Action are sufficient to establish that Respondent borrowed

⁸ *Rosario R. Ruggiero*, 52 S.E.C. 725, 728 (1996) (citing *Alton*, 52 S.E.C. at 382); see also *Guang Lu*, Exchange Act Rel. No. 51047, 2005 SEC LEXIS 117, at *19-20 (Jan. 14, 2005) (recognizing that “the candor and forthrightness of applicants is critical to the effectiveness of the screening process”).

funds from a customer, in violation of Conduct Rule 2370. By violating Rule 2370, Respondent also violated Rule 2110.⁹ Respondent also violated Rule 2110 by misrepresenting to his firm that he had not borrowed funds from a customer.¹⁰

V. Sanctions

A. Borrowing from a Customer and Misrepresentation to Firm

The FINRA Sanction Guidelines ("Sanction Guidelines") do not specifically address violations of Conduct Rule 2370. The Hearing Officer therefore considered the Sanction Guidelines applicable to improper use of customer funds for guidance. The Sanction Guidelines for improper use of customer funds provide for fines ranging from \$2,500 to \$50,000.¹¹ In addition, the Sanction Guidelines provide for a bar unless the improper use resulted from a respondent's misunderstanding of his customer's intended use of the funds or other mitigation exists.

There are no mitigating factors in this case, but there are several aggravating factors under the Principal Considerations in the Sanction Guidelines. Respondent concealed his misconduct by falsely certifying on his 2005 Annual Compliance Questionnaire that he had not borrowed any money from any customer. His willingness to lie about his activities evidences a cavalier attitude toward the rules that protect the investing public.¹²

Respondent took no corrective action. He failed to repay AS although he admitted in his on-the-record interview that he was aware of her financial and medical conditions. The evidence

⁹ *Dep't of Enforcement v. Kaweske*, No. C07040042, 2007 NASD Discip. LEXIS 5, at *14 n.8 (N.A.C. Feb. 12, 2007) ("A violation of another ... NASD rule ... is also a violation of NASD Conduct Rule 2110.").

¹⁰ *Dep't of Enforcement v. Davenport*, No. C05010017, 2003 NASD Discip. LEXIS 4, at *3 (N.A.C. May 7, 2003).

¹¹ FINRA Sanction Guidelines 38 (2007), available at <http://www.finra.org/RegulatoryEnforcement/index.htm> (then follow "FINRA Sanction Guidelines" hyperlink).

¹² See Sanction Guidelines 7, (Principal Consideration No. 13) ("Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence.").

shows that Respondent took advantage of his elderly customer.¹³ In addition, his misconduct caused AS significant financial harm¹⁴ and benefited Respondent.¹⁵

Accordingly, the Hearing Officer will bar Respondent for his violation of Conduct Rules 2370 and 2110. The Hearing Officer finds that a lesser sanction will not be sufficient to protect the investing public. In addition, the Hearing Officer will order Respondent to pay AS \$40,842.78 in restitution, plus interest thereon from November 1, 2005.¹⁶

B. Failure to Amend Form U4

The Sanction Guidelines for filing a false or inaccurate Form U4 provide for fines ranging from \$2,500 to \$50,000 and a suspension in any or all capacities for 5 to 30 business days.¹⁷ In egregious cases, such as those involving false, inaccurate, or misleading filings, the Sanction Guidelines recommend consideration of a longer suspension (of up to two years) or a bar. The Sanction Guidelines for submission of an inaccurate Form U4 also provide three considerations in determining the appropriate sanction: 1) whether the information at issue was significant and the nature of that information; 2) whether the respondent's failure to disclose information resulted in a statutorily disqualified individual associating with a firm; and 3) whether the respondent's misconduct resulted in harm to a registered person, another member firm, or any other person or entity.

¹³ Sanction Guidelines 7, (Principal Consideration No. 19) ("[t]he level of sophistication of the injured or affected customer").

¹⁴ The total amount Respondent borrowed represented approximately 20% of AS's net worth.

¹⁵ See Sanction Guidelines 6, (Principal Consideration No. 4) ("Whether the respondent voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct."); Sanction Guidelines 7, (Principal Consideration No. 17) ("Whether the respondent's misconduct resulted in the potential for respondent's monetary or other gain.").

¹⁶ See NASD Notice to Members 99-86 (October 1999).

¹⁷ Sanction Guidelines 73.

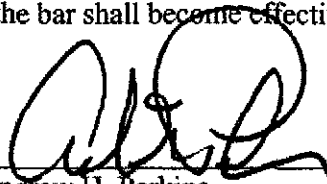
In this case, the omitted information was significant because it reflected Respondent's financial condition. Indeed, his financial troubles are linked to his other misconduct. Respondent claimed that he borrowed money from his customer, which he failed to repay, because he was in financial hardship. On the other hand, Respondent was not statutorily disqualified at the time, which is one of the principal considerations in the Sanction Guidelines.

Based on these factors, the appropriate sanction is a \$5,000 fine and a suspension in all capacities for six months. However, because Respondent is barred for improperly borrowing money from his customer, the Hearing Officer will not impose additional sanctions for this violation.

VI. Order

Respondent is barred in all capacities for borrowing money from his customer, which activity was prohibited by his firm and Conduct Rule 2370. In addition, Respondent is ordered to pay \$40,842.78 in restitution to customer AS, together with interest from November 1, 2005, until the date of payment. Interest shall be calculated pursuant to 26 U.S.C.S. § 6621(b)(2).¹⁸

These sanctions shall become effective on a date set by FINRA, but not sooner than 30 days after this Decision becomes the final disciplinary action of FINRA, except that if this Decision becomes FINRA's final disciplinary action, the bar shall become effective immediately.

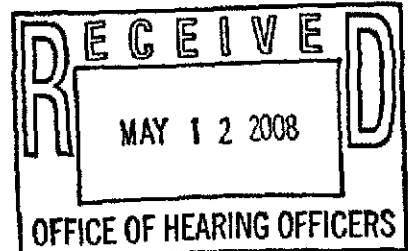


Andrew H. Perkins
Hearing Officer

¹⁸ The interest rate, which is used by the Internal Revenue Service to determine interest due on underpaid taxes, is adjusted each quarter and reflects market conditions. Customer AS is identified in the Addendum to this decision. The Addendum is served only on the parties.

Copies to:

Brian M. Wacik (*via overnight courier and first-class mail*)
David F. Newman, Esq. (*via electronic and first-class mail*)
Mark P. Dauer, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)



FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

V.

Brian M. Wacik (CRD No. 1667489),

Respondent.

DISCIPLINARY PROCEEDING
No. 2006006537201

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. At various times from on or about December 1, 2002 to on or about April 12, 2006 (relevant period), Brian M. Wacik (Wacik) willfully failed to amend his Form U4 to disclose material facts. Specifically, Wacik failed to disclose a compromise with a creditor and a federal tax lien. This conduct violated NASD Conduct Rule 2110 and IM-1000-1.
2. In September 2005 and October 2005, Wacik improperly borrowed a total of \$45,000 from an elderly, disabled customer, and then failed to repay \$40,000 of that debt. In addition, Wacik falsely denied that he had borrowed funds from a customer on his member firm's compliance questionnaire. This conduct violated NASD Conduct Rules 2370 and 2110.

RESPONDENT AND JURISDICTION

3. In May 1987, Wacik first became registered with FINRA (f/k/a National Association of Securities Dealers or NASD) as an Investment Company and Variable Contracts Products Representative through a member firm. From October 17, 2001 to May 15, 2006, Wacik was registered in that capacity through Brecek & Young Advisors, Inc. (Brecek & Young). Wacik has not been associated with a member firm since May 15, 2006.
4. Wacik remains subject to FINRA's jurisdiction pursuant to Article V, Section 4 of the FINRA By-Laws in that the misconduct alleged herein occurred while Wacik was associated with a member firm and this Complaint was filed within two years of his last association with a member firm.

FIRST CAUSE OF ACTION

Willful Failure to Disclose Material Information on Form U4 (NASD Conduct Rule 2110 and IM-1000-1)

5. The Department realleges and incorporates by reference paragraphs 1 through 4 above.
6. Pursuant to Article V, Section 2(c) of the FINRA By-Laws, the information provided on a Form U4 must be kept current by means of amendments not later than 30 days after the registered representative learns of "the facts and circumstances giving rise to the amendment." This requirement was in effect during the relevant period.

7. On or about December 1, 2002, Wacik settled a \$5,861 claim from a creditor by paying it \$4,000.
8. From on or about December 1, 2002 to on or about April 12, 2006, Wacik willfully failed to amend his Form U4 to disclose a material fact. Specifically, Wacik failed to disclose the compromise with the creditor on his Form U4 by amending it to reflect a "yes" answer to Question 14K., which asks, "[w]ithin the past 10 years: (1) have you made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy provision?"
9. On or about November 15, 2005, the Internal Revenue Service filed a federal tax lien for \$11,645 against Wacik.
10. From on or about November 15, 2005 to on or about February 13, 2006, Wacik willfully failed to amend his Form U4 to disclose a material fact. Specifically, Wacik failed to disclose the federal tax lien on his Form U4 by amending the Form U4 to reflect a "yes" answer to Question 14M., which asks, "Do you have any unsatisfied judgments or liens against you?"
11. By willfully failing to disclose material facts on a Form U4, Wacik violated NASD Conduct Rule 2110 and IM-1000-1.

SECOND CAUSE OF ACTION
Borrowing Funds from a Customer and Concealing the Loan
(NASD Conduct Rules 2370 and 2110)

12. The Department realleges and incorporates by reference paragraphs 1 through 11 above.

13. In July 2003, AS became a customer of Wacik's at Brecek & Young. AS' new account form indicated that he was 69 years old and had an annual income of less than \$25,000. AS suffers from multiple sclerosis.
14. Throughout 2005, Wacik's employer member firm Brecek & Young expressly prohibited its registered representatives from borrowing money from customers.
15. In about September 2005, Wacik approached AS and stated that he was having financial difficulties and solicited and obtained a \$5,000 loan from him. There was no documentation for this loan and no discussion regarding when it would be repaid. Wacik repaid the \$5,000 to AS within five weeks of borrowing the money and paid \$20 interest.
16. In about October 2005, Wacik again approached AS and stated that he was having financial difficulties and solicited and obtained a \$40,000 loan from him. Once again, there was no documentation regarding this loan and no discussion concerning when it would be repaid. To obtain the \$40,000 to lend to Wacik, AS partially surrendered funds from a variable annuity he owned and incurred a surrender charge of \$842.78. Wacik has not repaid the \$40,000 loan.
17. On November 10, 2005, Wacik completed, signed and submitted the 2005 "Annual Compliance Questionnaire" for Brecek & Young. The Questionnaire included a question whether Wacik had "borrowed or loaned any money or securities to or from a customer." Wacik falsely answered "No" to this question, failing to report that he had borrowed a total of \$45,000 from AS only shortly before completing the Questionnaire.

18. By improperly borrowing a total of \$45,000 from AS, Wacik violated NASD Conduct Rules 2370 and 2110. By failing to disclose the loans on the Questionnaire, Wacik violated NASD Conduct Rule 2110.

RELIEF REQUESTED

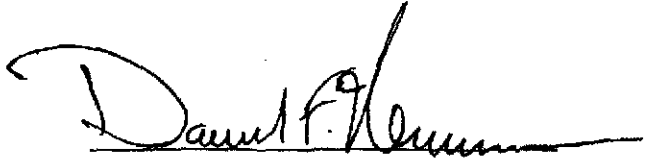
WHEREFORE, the Department respectfully requests that the Panel:

- A. order that one or more of the sanctions provided under NASD Rule 8310(a) be imposed, including that the Respondent be required to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest;
- B. order that the Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and
- C. make specific findings that Respondent's conduct, as alleged in the First Cause of Action, was willful; the omitted information was material; and,

D. the omission to state material facts was on a Form U4 application.

FINRA DEPARTMENT OF ENFORCEMENT

Date: May 8, 2008

A handwritten signature in black ink, appearing to read "David F. Newman", with a long horizontal flourish extending to the right.

David F. Newman, Senior Regional Counsel
John M. D'Amico, Regional Chief Counsel
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